BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROL COOLEY RADCLIFF	)	
Claimant	)	
VS.	)	
	)	Docket No. 177,447
LATSHAW ENTERPRISES	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

CAROL COOLEY RADCLIFF	)	
Claimant	)	
VS.	)	
	)	Docket No. 177,448
BEECH AIRCRAFT CORPORATION	)	
Respondent	)	
Self Insured	)	

ORDER

Claimant, respondent, Latshaw Enterprises, Inc., and respondent, Beech Aircraft Corporation, all appealed the Award entered by Administrative Law Judge Shannon S. Krysl on November 30, 1994. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Michael L. Snider of Wichita, Kansas. Respondent, Latshaw Enterprises, and its insurance carrier appeared by their attorney, Kurt Ratzlaff appearing for Douglas Hobbs of Wichita, Kansas. Respondent, Beech Aircraft Corporation, a qualified self-insured, appeared by and through its attorney, Terry Torline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Steven Foulston of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

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Respondent asked Appeals Board review of the following issues:

(1) Whether timely written claim was served upon respondent.

(2) Whether claimant suffered a personal injury by accident that arose out of and in the course of her employment with respondent.

Claimant requested Appeals Board review of the following:

(3) The nature and extent of claimant's disability.

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(4) Respondent appealed whether claimant suffered a personal injury by accident that arose out of and in the course of her employment with respondent.

(5) Claimant appealed the issue of nature and extent of claimant's disability.

(6) Respondent asked Appeals Board review of the issue of the liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

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(1) The Appeals Board will first address the issues raised in Docket No. 177,448 instead of Docket No. 177,447 as the former docket number alleges the earliest date of accident. The claimant in Docket No. 177,448 claims a date of accident of each and every day from May 17, 1991 through October 31, 1991, while employed by Beech Aircraft Corporation (hereinafter referred to as Beech).

Claimant had worked for Beech on numerous occasions over the years. At the time of her alleged injury, claimant had been employed since 1988 as a fork-lift driver for six hours per day and sorting five to six thousand parts weighing from two to seventy pounds the remaining two hours of the day. Claimant's hands first became symptomatic in 1991. Her hands would go to sleep, have numbness, and pain. Lifting and driving the fork-lift would make them worse. Claimant first sought medical treatment on her own with her family doctor, Phillip Russell, M.D., on May 16, 1991. Dr. Russell prescribed wrist splints for claimant to wear for three weeks. When claimant came to work wearing the splints on May 17, 1991, claimant's supervisor, Carl Barrier, immediately sent claimant to the first aid office. Mr. Barrier testified it was the company's policy for employees to be examined at the first aid office for any medical problem whether work related or not. Mr. Barrier indicated that claimant did not relate her wrist problems to her work.

Claimant was seen in the first aid facility by John F. McMaster, M.D., the medical director for Beech. Dr. McMaster's medical notes do not indicate whether claimant related her bilateral hand problems to her work. Dr. McMaster recommended an ergonomics screen, safety report of her job requirements, wearing of the wrist splints as prescribed by the family physician, and for claimant to return in three weeks. Claimant returned as directed on June 11, 1991, with wrist pain resolved. Dr. McMaster also notified claimant that she could return PRN or as needed. The doctor testified he considered claimant's family physician, Dr. Russell, as the treating physician and not himself. The doctor opined claimant had no permanent impairment and did not need permanent work restrictions when he last examined the claimant on June 11, 1991. Dr. McMaster established that the first aid facility records did not indicate that claimant had returned for any further treatment.

Claimant worked for Beech until she was terminated for excessive absenteeism on October 31, 1991. Those absences were not related to her bilateral wrist and hand complaints. Nevertheless, claimant testified her hands worsened as she was performing her work activities through the last day she worked. Claimant also testified she never requested further medical treatment from Beech for her bilateral hand problems until a claim was served upon Beech in a letter from her attorney dated May 24, 1993.

Beech argues that claimant's claim for workers compensation benefits is barred because she failed to timely serve a claim for workers compensation benefits on Beech. An employee is required to serve upon an employer a written claim for compensation within two hundred days (200 days) after the date of accident or in cases where compensation payments have been suspended within 200 days after the day of the last payment of compensation. See K.S.A. 44-520a (Ensley). If the employer fails to file an accident report with the director after the injured employee has given notice of such accident, then the 200 day limit to serve written claim is extended to one year from the date of accident, suspension of payment of disability compensation or the date of the last medical treatment authorized by the employer. *See* K.S.A. 44-557(c) (Ensley).

In the instant case, there is no evidence of whether or not the employer filed an accident report with the director. Therefore, if we assume for purposes of this decision that claimant gave notice of injury to the employer, she then had one year from the date of accident to file a written claim for compensation. Since claimant testified her bilateral hand problem worsened as she worked up until the last day, October 31, 1991, the Appeals Board finds this is the appropriate date of accident for claimant's claim for compensation benefits. *See* Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

Claimant contends the first aid pass she signed and also her supervisor, Carl Barrier, signed on May 17, 1991, meets the written claim requirement of K.S.A. 44-520a (Ensley). The claimant cites the case of Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973), as holding that a written claim for compensation prescribed by K.S.A. 1972 Supp. 44-520a need not take on any particular form so long as it is in fact a claim. Whether or not a written claim was served on the respondent is a question of fact. It is for the trial court to determine what the parties had in mind. The purpose of the written claim statute is to require the employee to make a positive claim in writing, within one year, if he or she desires to seek recovery under the Workers Compensation Act. *See* Ricker v. Yellow Transit Freight Lines, Inc., 191 Kan. 151, 379 P.2d 279 (1963). The Appeals Board finds the first aid pass signed by the claimant and claimant's supervisor dated May 17, 1991 did not make a claim for compensation upon Beech as required by K.S.A. 44-520a (Ensley). The first aid pass simply was a vehicle used by Beech for employees for authorization to leave their work station to go to the first aid facility. After the claimant arrived at the first aid facility and was examined by the doctor the only written message contained in the pass was that the claimant was wearing splints prescribed by Dr. Russell because of a pinched nerve and claimant lifted 70 to 80 pounds and drove a fork lift. The Appeals Board further finds that based on the facts and circumstances of this case, it is not reasonable to conclude the parties had in mind for the first aid pass to be a claim for compensation. *See* Lawrence v. Cobler, 22 Kan. App. 2d 291, Syl. ¶ 3, 915 P.2d 157 (1996).

Claimant also argues that because Dr. McMasters indicated on the medical note of June 11, 1991, that the claimant could return PRN, claimant was authorized continued medical treatment which was never revoked. Therefore, claimant contends that a written

claim filed in May 1993 should be considered timely based upon the arguments presented in Blake v. Hutchinson Manufacturing Co., 213 Kan. 511, 516 P.2d 1008 (1973). The Appeals Board finds, that in this case, Dr. McMaster only indicated to the claimant to return PRN because that was the open door policy of Beech's first aid facility. Claimant herself testified that she never returned and sought medical treatment from Beech even though she continued to have symptoms in her hands. Dr. McMaster only treated claimant from Beech's first aid facility and not from his private office. Therefore, the Appeals Board finds that after claimant terminated her employment on October 31, 1991, she did not expect or intend for Beech to have any responsibility for further treating her bilateral hand symptoms. The Appeals Board finds that claimant's request for workers compensation benefits against Beech is barred as claimant failed to serve a timely written claim on Beech as required by K.S.A. 44-520a (Ensley).

Having found that claimant in Docket No. 177,448 failed to serve upon the respondent a timely written claim for compensation benefits, the remaining issues raised by the parties will not be addressed as they are rendered moot.

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(4) Claimant obtained employment with the respondent, Latshaw Enterprises (hereinafter referred to as Latshaw), after she was terminated from her employment at Beech. Claimant started working for Latshaw on August 8, 1992, following nine months of receiving unemployment benefits. Claimant's job at Latshaw was a machine attendant which required her to perform repetitive work activities with her upper extremities. Claimant testified her hands improved in the ten months that she did not work after she was terminated from Beech. Nevertheless, claimant testified her hands slightly bothered her when she started to work for Latshaw.

Claimant established that as she performed her repetitive work activities at Latshaw her upper extremity symptoms worsened. Claimant sought medical treatment for her upper extremity symptoms from Dr. Russell, her family physician, on June 3, 1993. Dr. Russell again prescribed wrist splints and at that time diagnosed carpal tunnel syndrome. When claimant returned to work with the wrist splints, Latshaw referred claimant to Dr. J. Mark Melhorn, an orthopedic surgeon in Wichita, Kansas, for examination and treatment. Claimant was off approximately one week before she saw Dr. Melhorn on June 15, 1993. Dr. Melhorn diagnosed bilateral carpal tunnel syndrome and first prescribed conservative treatment. Claimant, however, did not improve with the conservative treatment. Dr. Melhorn then performed a left carpal tunnel syndrome release on September 8, 1993, and a right carpal tunnel syndrome release on September 20, 1993. Claimant missed only a day or two of work after each of these surgeries.

Two physicians testified in this case on the issue of the relationship of claimant's work activities at Latshaw to her bilateral carpal tunnel syndrome condition. Dr. Melhorn, claimant's treating physician, opined that claimant had a preexisting tendinitis condition

while she was employed for Beech. Dr. Melhorn testified that the tendinitis condition was a precursor to claimant's carpal tunnel syndrome condition. The doctor went on to opine that the repetitive work activities claimant performed at Latshaw were a causative factor in claimant's development of bilateral carpal tunnel syndrome.

Dr. Lawrence R. Blaty examined the claimant at the request of claimant's attorney on November 18, 1993. Dr. Blaty opined claimant developed bilateral carpal tunnel syndrome while working for Beech. It was Dr. Blaty's opinion that claimant's carpal tunnel syndrome condition was further aggravated by her repetitive work activities at Latshaw that culminated in the need for surgery.

The Administrative Law Judge found the record established that claimant suffered a work-related injury while working for Latshaw. The Appeals Board agrees and affirms that finding. The testimony of the claimant coupled with the medical testimony of both Dr. Melhorn and Dr. Blaty establish that claimant's repetitive work activities performed while employed by Latshaw either aggravated a prior tendinitis condition that developed into bilateral carpal tunnel syndrome or a preexisting carpal tunnel syndrome condition was worsened to the point that surgical intervention was needed.

(5) The Administrative Law Judge determined the appropriate date of accident for injuries claimant received while employed by Latshaw was June 15, 1993. The Appeals Board agrees with that determination as the claimant testified her bilateral upper extremity symptoms worsened as she continued to perform her regular job duties for Latshaw. Claimant was first seen by Dr. Melhorn for the worsening condition on June 15, 1993, and was placed on light duty. Claimant remained on light duty until after her bilateral surgeries which took place in September 1993. Dr. Melhorn first scheduled the surgeries in July 1993. However, the surgeries were postponed until September 1993 because the insurance carrier refused to authorize the surgeries in July 1993. Accordingly, the Appeals Board concludes that claimant's bilateral carpal tunnel syndrome condition probably did not worsen after claimant was placed on light duty by Dr. Melhorn on June 15, 1993. Therefore, June 15, 1993, is the appropriate date of accident for claimant's repetitive carpal tunnel syndrome condition. *See* Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

The Administrative Law Judge found claimant was not eligible for a work disability because the respondent had retained claimant in its employment earning a wage that exceeded the wage she was earning at the time of her injury. The Appeals Board also agrees and affirms that finding of the Administrative Law Judge.

Claimant, however, argued she presented testimony of vocational expert, James T. Molski, that rebutted the presumption contained in K.S.A. 1992 Supp. 44-510e that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury. Mr. Molski, utilizing Dr. Blaty's permanent work restrictions, opined claimant

had lost 60 to 65 percent of her ability to perform work in the open labor market. Therefore, claimant contends she is entitled to a work disability of 31.25 percent arrived at by weighing claimant's loss of labor market of 62.5 percent with no loss of comparable wage.

The Appeals Board finds that claimant has been retained by the respondent in the same job as a machine attendant as she was working at the time of her injury. The only accommodation the respondent has had to make to this job is that claimant is restricted to 35 pounds lifting pursuant to the permanent restrictions placed on her by the treating physician, Dr. Melhorn. There is no evidence in the record that claimant is performing a temporary type job or that such job has a limited duration. Accordingly, the Appeals Board finds claimant's entitlement to permanent partial general disability benefits are limited to permanent functional impairment as claimant has failed to overcome the presumption of no work disability. *See* Elliff v. Derr Constr. Co., 19 Kan. App. 2d 509, Syl. ¶ 4, 875 P.2d 983 (1993). The Administrative Law Judge arrived at a 14 percent whole body permanent functional impairment rating by averaging Dr. Melhorn's 10 percent rating with Dr. Blaty's 18 percent rating. The Appeals Board finds the 14 percent whole body permanent functional impairment rating is appropriate and adopts the same as its own.

However, the Administrative Law Judge then found claimant had a 3 percent preexisting permanent functional impairment and reduced the 14 percent rating by the 3 percent preexisting impairment resulting in an award of 11 percent. As previously noted, the Appeals Board affirmed the Administrative Law Judge's finding that the appropriate date of accident in this case was June 15, 1993. K.S.A. 44-501(c) provides for a reduction in an award of compensation by the amount of functional impairment determined to be preexisting. However, this statute was not in effect until July 1, 1993 which is after the June 15, 1993, date of accident in this case. The Appeals Board concludes that since the date of accident was found to be June 15, 1993, it is not appropriate to reduce claimant's award for permanent partial disability by the amount of functional impairment determined to be preexisting. Accordingly, the Appeals Board finds that claimant is entitled to an award of permanent partial general disability benefits of 14 percent.

(6) The Administrative Law Judge found the respondent failed to prove that the Fund had any liability for benefits awarded in this claim. The Appeals Board agrees with the Administrative Law Judge and affirms that finding. The record does not contain evidence that established claimant was a handicapped employee at the time she was hired by the respondent. Additionally, the facts of the case fail to show purposeful or intentional misrepresentation to invoke the conclusive presumption of knowledge contained in K.S.A. 1992 Supp. 44-567(c).

All other findings and conclusions set forth in the Award of the Administrative Law Judge are adopted and incorporated by the Appeals Board as its own to the extent that they are not inconsistent with this Order.

AWARD

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WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Shannon S. Krysl dated November 30, 1994, should be, and is hereby reversed and the claimant is denied an award of compensation benefits against the respondent, Beech Aircraft Corporation, a qualified self-insured.

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WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Shannon S. Krysl dated November 30, 1994, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carol Cooley Radcliff, and against the respondent, Latshaw Enterprises, and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred on June 15, 1993, and based upon an average weekly wage of $241.17.

Claimant is entitled to 2.14 weeks of temporary total disability at the rate of $160.79 per week or $344.09, followed by 412.86 weeks at the rate of $22.51 per week or $9,293.48 for a 14% permanent partial general disability making a total award of $9,637.57.

As of December 20, 1996, there is due and owing claimant 2.14 weeks of temporary total disability compensation at the rate of $160.79 per week or $344.09, followed by 181.29 weeks of permanent partial disability compensation at the rate of $22.51 per week in the sum of $4,080.84, for a total due and owing of $4,424.93, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $5,212.64 is to be paid for 231.57 weeks at the rate of $22.51 per week, until fully paid or further order of the Director.

All remaining orders of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L Snider, Wichita, KS
Douglas Hobbs, Wichita, KS
Terry Torline, Wichita, KS
Steven Foulston, Wichita, KS
Office of Administrative Law Judge, Wichita, KS
Philip S. Harness, Director